IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: A106/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUGDES: NO
REVISED
Date: 30/11/2021

In the matter between:

SIPHO AMOS MNDAWENI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

AC BASSON, J

1) The appellant (a 58-year-old man at the time) appeared before the Regional Court of Gauteng,·Benoni ,on the following chargers

- Count 1: Rape in contravention with the provisions of section 3[1] of Act 32 of 2007 read with the provisions of section 51(1) of the Criminal Law Amendment Act.[2]
- Count 2: Rape in contravention with the provisions of section 3 of Act 32 of 2007 read with the provisions of section 51(1) of the Criminal Law Amendment Act.

[2] On 18 January 2021, the appellant was convicted as charged and was sentenced to 15 (fifteen) years' imprisonment on each count after the court found substantial and compelling circumstances to deviate from the minimum prescribed sentences. The two sentences were ordered to run concurrently. The appellant was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act.[3] The court further ordered that his name be registered in the sexual offenders register in terms of section 50(1) of the Sexual Offences and Related Matters Act.[4]

[3] The appellant applied for leave to appeal and was granted leave to appeal the conviction.

[4] The appellant was legally represented during the trial proceedings. The trial commenced on 23 June 2017 when a plea of not guilty was entered. The matter was remanded in order for the state to obtain the services of an intermediary because two minor children were the complainants of a sexual assault. The matter was thereafter remanded for several more occasions and only on 10 April 2018, the matter proceeded before another magistrate.

[5] The complainants in this matter were both minors (approximately 6 years and 7 years of age respectively) at the time of the incident. The

---

[1] Section 3 reads as follows: *"3 Rape Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with* a *complainant ('B'), without the consent of B, is guilty of the offence of rape."*
[2] Act 105 of 1997.
[3] Act 60 of 2000.
[4] Act 32 of 2007.

proceedings were held *in camera.* Ms Morongwa Mopedi was appointed as an intermediary to assist the minor children.

The first complainant

[6] The first complainant, identified as ML, testified that she was 10 years old and was doing Grade 4. She is a cousin to the second complainant, identified as LO, as their mothers are sisters. She testified that on the day of the incident she was at home with LO when the appellant, who is their neighbour, called them to his house. The complainant said that the appellant threw some money on the ground and told them to go inside of the house.

[7] It was her evidence that they both went to the appellant's house and that he was standing at the door inside the house. He then unzipped his pants and took out his penis and told them to play with his penis. They both complied. ML testified that she went inside of the house. LO was told to remain outside of the house. The appellant then told her to kneel down on a matrass that was on the floor. She complied and knelt. She said that she was told to undress her pants as well as her underwear. The appellant then unzipped his pants and took out his penis and attempted to insert it in her buttocks and vagina but was unable to penetrate. He then told her to stand up and get dressed and leave. She confirmed that she told her mother (Ms L[....]) about the incident.

[8] The complainant's mother, Ms L[....] confirmed that the appellant was their neighbour and that she left the children at home and that she went to the school to attend to the registration of the children. She came back and found the children playing. Later while she was busy with her chores, ML came to her crying and said that the appellant did funny things to them. She then called LO and asked her what had happened. She testified that LO confirmed what ML had said to her.

[9] Ms L[....] testified that both complainants reported to her that the

appellant gave them money to buy sweets, called them to his yard where he undressed and ordered them to undress. She said that she was further told that the appellant told the children to play with his penis. He then tried to insert his penis inside ML's anus but that he was unable to do so. He also attempted to insert his penis inside her vagina but was likewise unable to do so. It was her evidence that she took the children and went to her parental home to inform DL's mother. The police were then called and both children were taken for medical examination.

The second complainant

[10] Ms D[....] testified that she is LD's mother and that LD was born on 7 June 2007. She said that she was home when Ms L[....] arrived home with LD and ML. Ms L[....] reported to her that the appellant had raped the children. She said she had asked the children, and that ML explained to her what the appellant did to them. She testified that LD was not walking properly.

[11] LD also testified through the intermediary. She said that on the day of the incident, she went outside to throw away dirty water after washing the dishes. The appellant then threw R2.00 into their yard. She picked it up. The appellant then called them and said they must come through the fence. She went with ML to the appellant's house. He was standing at the door, he unzipped his pants, took out his penis and told them to touch or play with his penis. She did play with his penis and ML did the same.

[12] She testified that the appellant then called her inside the house and told ML to remain at the door. While inside, the appellant told her to kneel down on the matrass and take off her pants and panty. She took them off and the appellant unzipped his pants, kneeled behind her and inserted his penis into her anus. It was her evidence that he had done that several times. When he was done, he told her to get dressed and call ML to get inside the house. She waited for her at the door. ML later came out and the c3ppellant threw money at them through the window. She said that he told her not to tell her parents. She

confirmed that they went to buy sweets with the money where after they went to play. It was LD's evidence that she noticed white substance (sperm) on her pants and that the police took the said pants.

Medical examination of the complainants

[13] A professional nurse, Ms Gloria Zumbu, examined the complainants. Dr Muanamputu Makiangi, her supervisor was, however, called by the state to testify on her behalf. Dr Makiangi testified that Ms Zumbu had been on long sick leave for almost two years and could not attend court. Ms Zumbu had examined both the complainants on 15 January 2015 and completed two J88 forms which were admitted as exhibits. No injuries were noted to the genital and anal areas of both the complainants. (I will return to her evidence.)

The appellant's evidence

[14] In his evidence the appellant confirmed that he knows both complainants. He said that on the day of the incident, the complainants came to his place and asked for peaches from the tree in his yard. He gave it to them but they continued to play in his yard. The appellant testified that the children were looking through his window and that he chased them away. He denied the allegations against him and said that these were false allegations.

AD CONVICTION

[15] The complainants were about 6 and 7 years old respectively at the time of the incident but much older at the time of the trial. On behalf of the appellant it was submitted that the court did not exercise caution when dealing with the evidence of the complainants as they are children. It was further submitted that their evidence was not clear and satisfactory on all the material aspects and that they did not corroborate each other on all aspects.

[16] It is common cause that there were no eyewitnesses or forensic evidence presented in the matter. The case of the state was based on the evidence of the complainants as well as circumstantial evidence. Unfortunately, the police

dismally failed these two young girls by not sending the stained underwear for forensic examination.

[17] Returning to one of the main criticisms against the judgment of the a *quo* namely that the magistrate did not apply the cautionary rules applicable to the evidence of the children as they were single child witnesses. In this regard the court was referred to the decision in *R v Manda:*[5]

> *"Again the nature of the evidence given by the child may be of* a *simple kind and may relate to* a *subject matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility. In such circumstances it might perhaps be unfortunate if the courts acted upon* a *right rule that corroboration should always be present before the child's evidence is accepted. Nevertheless the dangers inherent in reliance upon the uncorroborated evidence of* a *young child must not be underrated. The imaginativeness and suggestibility of children are only two of* a *number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. It seems to me that the proper approach to* a *consideration of their evidence is to follow the lines adopted in the case of accomplices (Rex v Ncanana, 1948 (4) SA 399 (AD)) and in the case of complaints in charges of sexual assault (Rex v W., 1949 (3) SA 772 (AD)). The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent* a *court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial Court."*

See also in respect of the evidence of a minor S *v Hanekom*[6] where the court

[5] 1951 (3) SA 158 (A) at 163.
[6] 2011(1) SACR 430 (WCC).

stated:

> "So, *in evaluating the evidence of* a *single witness who is also* a *child, our courts have laid down certain general guidelines which are of assistance when applying the cautionary rules. In such* a *case:*
> *(a) A court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case.*
> *(b) A court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects.*
> *(c) Although corroboration is not* a *prerequisite for* a *conviction,* a *court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt.*
> *(d) Failing corroboration,* a *court will look for some feature in the evidence which gives the implication by* a *single child witness enough of* a *hallmark of trustworthiness to reduce substantially the risk of* a *wrong reliance upon her evidence."*

See also *Woji v Santam Insurance* Co *Ltd:* [7]

> *"Trustworthiness of* a *child witness depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs while the capacity to understand the questions put, and to frame and express intelligent answers".*

[7] 1981(1) SA 1021 (A).

[18] I am not persuaded that the magistrate failed to apply the relevant cautionary rules in evaluating the evidence of the two children. A reading of the judgment shows that the court a *quo* was alive to the fact that the two complainants were minors at the time of the incident (and during the trial proceedings) and carefully considered the possible contradictions in their versions. The learned magistrate was also alive to the fact that the two complainants did contradict each other on aspects as to who went first into the house of the appellant. But, despite some contradictions in their evidence, the complainants were consistent and clear as to the fact that that they were individually called into the appellant's home whereafter they were raped. They also contradicted each other on the amount of coins given to them. The learned magistrate correctly pointed out that the amount of coins has very little significance, as it is clear that the appellant gave them a few coins on two occasions.

[19] Apart from the fact that the court *a quo* fully dealt with the contradictions in the judgment and concluded that their versions were not that different when it came to the gist of what actually happened despite the fact that they were both very young at the time of the incident, the court also specifically considered whether the evidence was a fictitious imagination of the children. The court concluded that this was not the case and that the complainants were able to testify exactly what had happened to them on that day. The evidence of the two complainants were also corroborated by the two mothers who were told about the incident soon after it has happened. It should also be borne in mind that contradictions *per se* does not lead to the rejection of the evidence of a witness. In S *v Mkhole*[8] the court explained:

> *"Contradictions per se do not lead to the rejection of a witness's evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility: in each case the trier of fact has to make an evaluation, taking into account such matters as the*

[8] 1990(1) SACR 95 (A)

nature of the contradiction, their number of importance, and their bearing on other parts of the witnesses' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction. One could ad that, if anything, the contradictions points away from the conspiracy relied on".

[20] The evidence of the parents of the two complainants provided corroboration for the versions of the complainants and confirmed the versions of the two complainants in respect of what happened to them in material respects.

[21] Although not part of the initial heads of argument placed before the Court, counsel on behalf of the appellant raised two additional points. The first was that the magistrate placed an onus on the appellant with reference to a passage in the judgment where the learned magistrate observed as follows in respect of the evidence that the appellant was falsely implicated because of some disagreement between the appellant's daughter and the mothers of the two girls:

"I find it difficult to can (sic) reject the evidence of these children. And I am not persuaded that the accused is as innocent as he wants the court to belief (sic)."

[22] I do not agree with the submission that these comments by the magistrate implied that an onus was placed on the appellant to proof that the allegations were not fabricated. The magistrate was very much alive to the fact that there is no onus on the appellant as is evident if regard is had to the preceding paragraph:

"This kind of evidence it (sic) sounds very much fabricated although I must quickly mention that the accused does not have any reason, or a *duty to convince the Court that the complainants must be having*

some kind of an ulterior motive in order to level false allegations against him."

[23] The appellant also attacked his guilty finding with reference to the fact that no injuries were noted to the genitals and the anus of the two children upon a physical examination. Firstly, the police did not take the children for medical examination immediately and that may very well be the reason why no injuries were seen. Secondly, Dr Makiangi testified that this could be due to various reasons and testified that the fact that the hymen was still intact does not necessarily mean that they were not penetrated.

[24] The court a *quo,* weighed up all the evidence and duly took notice of the medical evidence together with the *viva voce* evidence before concluding that there was indeed "a *successful penetration of the two children both in their anus and also vagina".*

[25] During argument, counsel on behalf of the appellant, with reference to the absence of injuries noted to the private parts of the children also submitted that rape was not proven because penetration did not take place.

[26] The magistrate dealt with this aspect in the judgment and with reference to the Sexual Offences and Related Matters Amendment Act [9] and the broad definition of sexual penetration, concluded that there was indeed sufficient evidence to prove that penetration did in fact take place even though penetration may not have gone beyond the level of the hymen. In the present matter the evidence presented to the court was that the appellant attempted several times to penetrate the children. He not only attempted penetration of their vaginas, he also attempted to penetrate their anus. The evidence was that LO could not walk

---

[9] Act 32 of 2007. The Act defines sexual penetration to *"include[s] any act which causes penetration to any extent whatsoever by-*

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

property to such an extent that she was taken for x-rays. I am not persuaded that the learned magistrate erred on the evidence in finding that penetration albeit only partially did indeed take place which is sufficient to establish rape as contemplated by the Sexual Offences and Related Matters Amendment Act. (I should also point out that in passing sentence, the magistrate took into account that the appellant did not fully penetrate the complainants and regarded this fact as one of the compelling and substantial circumstances to deviate from the minimum sentence of life imprisonment.)

[27] The issue of partial penetration has been considered by our courts and in *S v* H[10] the appellant was not able to penetrate the complainant as it was painful to her. (In the present matter the appellant was unable to penetrate the two complainants due to their young age.) The Court held as follows:

> *"51. That leaves the question of what constitutes common law rape. This* was *well settled in our law. It* was *defined* as *the unlawful and intentional act of sexual intercourse with a female without her consent. See generally Principles of Criminal Law (3rd ed.) Jonathan Burchell at p706 and the extension of the common law in Masiya v Director of Public Prosecutions, Pretoria and another 2007(5) SA 30 (CC) at paras 39 to 44.*
>
> *Our common Jaw held that the slightest penetration was sufficient to complete the act of sexual intercourse. Burchell (3rd edition) puts it as follows at 706; "it is thus irrelevant that the male does not emit semen, nor does it matter that the woman's hymen is not ruptured". See cases such as* S *v K 1972 (2) SA 898 (A) at 900C where rape occurred even though the woman's hymen was not ruptured. The author sites an extract at ftn 48 from EH East in 1803 (1 Pleas of the Crown 437):*
>
> > *"The quick sense of honour, the pride of virtue in the female heart ... is already violated past redemption and the injurious*

(c) *the genital organs of an animal, into or beyond the mouth of another person,"*

[10] 2014 JDR 1917 (GJ).

consequences to society are in every respect complete"."

[28] As already pointed out, the magistrate was critical of the evidence presented by the appellant that he blamed the mothers of the two complainants for fabricating this story against him. According to him his daughter and the mothers of the two complainants were friends. At one stage they were very close but they turned out to be enemies as they were competing with clothes. According to the appellant the fact that they were no longer on good terms prompted them (the mothers) to get back at him.

[29] The magistrate, although mindful of the fact that the appellant had no duty to convince the court that the complainant must have had an ulterior motive to level false accusations against him, rejected the version of the appellant as being fabricated. On the other hand, the court could not find any reasons to reject the evidence of the two complainants.

[30] It is trite that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt. If his version is reasonably possibly true, he is entitled to his acquittal. In S *v Mbuli*[11] the following was stated:

> *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants* was *established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing* so, *one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to* say *that* a *broad and indulgent approach is appropriate when*

[11] 2003(1) SACR 97 (SCA)

evaluating evidence. Far from it. There is no substitute for a *detailed and critical examination of each and every component in* a *body of evidence. But, once that has been done, it is necessary to step back* a *pace and consider the mosaic* as a *whole. If that is not done, one may fail to see the wood for the trees."*

[31] It is accepted that while the appellant is entitled to a rehearing, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

[32] I can find no misdirection or reason to interfere with these proceedings. In *S v Prinsloo and Others,*[12] the stance of the law regarding the duty and power of a court of appeal when dealing with findings of fact and credibility is explained as follows:

"[183] Counsel for the second accused argues further that the trial court erred in its factual findings and that it ought to have been held that he was *merely* a *passive observer at the meeting. The approach to factual findings in an appeal* was *correctly set out by Jones Jin* S *v Leve 2011 (1)* SACR *87 (ECG) at 90g - i where he explained:*

'The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See *the well-known cases of R v Dhlumayo and Another 1948 (2)* SA *677 (A) at 705 and the passages which follow;* S *v Hadebe and*

[12] 2016(2) SACR 25 (SCA)

Others 1997 (2) SACR *641 (SCA) at 645; and* S *v Francis 1991 (1)* SACR *198 (A) at 204c- f. These principles are no less applicable in cases involving the application of* a *cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of* a *cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny,* a *court of appeal will not readily depart from his conclusions.'"*

[30] See also S *v Chinridze*[13] and S *v Mabena*[14] where the following was said regarding allegations of errors in the judgment of the court a *quo:*

> *"[11] On appeal it* was *argued that the regional magistrate ought to have accepted that the evidence of the appellant* was *reasonably possibly true. It* was, *however, not suggested that the regional magistrate misdirected herself in any respect. The power of an appeal court, to interfere on fact with the findings of the court below, is limited. Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case. I think that the regional magistrate* was *correct in her finding that intercourse had in fact taken place and, in the light of that finding, rightly rejected the appellant's evidence. The appeal against conviction must therefore fail."*

[31] It is thus not the duty of the court on appeal to re-evaluate the evidence afresh as if sitting as a trial court, but to decide whether patently wrong findings and/or misdirection by a magistrate led to a failure of justice.

[32] I am not persuaded that the court a quo misdirected itself or committed a serious irregularity in evaluating the evidence nor with respect to the credibility

---

[13] 2015(1) SACR 364 (GP) ad para [39]
[14] 2012(2) SACR 287 (GNP)

findings.

ORDER

[33] The order that I propose is the following:

> "The appeal by the appellant against his conviction is dismissed and the conviction is confirmed."

A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree

E. BALOYI-MERE
ACTIG JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this mater on Caselines. The date for hand-down is deemed to be 30 November 2021.

Case number : A106/2021

Matter heard on : 18 November 2021

APPEARANCES:

FOR THE APPLICANT : ADV M VAN WYNGAARD
INSTRUCTED BY : LEONI NAUDE INC

FOR THE STATE : ADV C HARMZEN
INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS